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In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. .....

LESTER E. BUTZMAN, SR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the said court, Lester E. Butzman, Sr. vs. United States of America on July 16, 1953.

OPINIONS BELOW.

The opinion of the United States Court of Appeals, Sixth Circuit, filed June 22, 1953, and the opinion of the Trial Judge of the United States District Court, are contained in the certified Transcript of the Record.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 16, 1953. The jurisdiction is invoked under 28 U. S. C. A. § 1254(1): the United States Court of Appeals, Sixth Circuit has rendered a decision in conflict with the decisions of other circuit courts of appeals on the same matter; has decided an important question of Federal law

which has not been, but should be settled by this Court; has decided a federal question to wit: The construction and application of a Federal Statute defining a crime under the Federal Statutes in conflict with applicable decisions and the accepted and usual course of judicial proceedings, and so as to deprive the petitioner of his liberty, contrary to the constitution of the United States, when by a proper construction and application, no evidence whatever warrants conviction thereunder; has decided a Federal question, to wit, the elements required to establish a crime under the indictment, when no crime is charged; all of which should be settled by this Court.

QUESTIONS PRESENTED.

I. May a defendant be convicted under Title 26, Section 3793(a)(1), quoted in Appendix, page 11 where there has been no simulation or false or fraudulent execution of a document, he himself having signed the document, and not representing it as any one else's document, merely because it is alleged by the Government the document contained a statement of the character described in II?

II. Is an indictment charging a defendant with wilfully and knowingly, falsely and fraudulently, with intent to defraud, executing a document required by the provisions of the Internal Revenue laws and regulations, to wit, application for Tentative Adjustment, in which document it is represented that said *Lester E. Butzman, Sr., was entitled under the provisions of the Internal Revenue laws to claim a credit for the years 1941, 1942 and 1944 of refunds totalling $56,078.61,* a valid indictment; which representation is only a conclusion of law, and therefore, not of the kind to make a crime?

III. May a defendant be convicted under the recited statute and indictment (Appendix) when the document or application for Tentative Adjustment was presented to the authority which had at hand the means of knowledge, as to whether certificates of necessity had been granted, and must have examined its files before acting; which fact shows the applicant had no intent to defraud, but must have forgotten and acted under error?

IV. Does a defendant who files a motion for change of venue on account of prejudice in the community aroused by the newspapers and repeats such motion on the trial day, lose his right to claim error, because he tries the cause to the court?

STATUTE INVOLVED.

The pertinent statutory provision is printed in Appendix, page 11.

THE INDICTMENT.

This is set out in the Appendix, page 11.

STATEMENT.

The appellant was indicted under a charge of violation Title 26, Section 3793(a) Internal Revenue Code, set forth in Appendix, page 11. He moved for a change of venue, because of the vicious campaign of the newspapers against him, set forth in the Record, pages 7 to 21, and when the motion was denied, proceeded to trial without a jury. He was convicted by the District Court and sentenced to three years imprisonment and no fine and no costs assessed; he appealed to the Court of Appeals, which affirmed the lower court, whereupon after petition for rehearing was denied, he filed the within Petition for Certiorari.

The briefs of the appellant filed in the Court of Appeals contain a full and accurate account of the facts and evidence (pages 1 to 14, main brief); and, therefore, we confine our statement of the facts to the bare essentials, however much we would wish to show the atmosphere in which defendant appellant was tried, and the errors of law that occurred, beyond those manifested in the selected questions.

The defendant Butzman, Sr. was the head of a partnership, which from a small specialty machine shop grew to a plant employing several thousand people engaged in manufacturing munitions. Originally he employed William J. Franz, as his accountant, he being busy often with his many duties all the hours of the day (R. 501-502, 325, 507, 508, 510, 515 and 521). Applications for certificates of necessity were prepared by Wm. J. Franz and signed by him, and notices of rejection were found in the private files of Wm. Franz three years later (Gov't Exh. 11, 14, R. 189 to 193), after he was discharged as accountant.

When Mr. Craig was accountant, and in 1946, it became necessary to apply for refunds on applications which referred to the certificates of necessity and previous documents. In uncertainty as to them counsel for appellant wrote the Authority to learn if all preliminary documents had been acceptable and after a number of weeks the refunds came. Since the Authority had all the records, and in the nature of things would not grant refunds, unless all preliminary documents and actions to entitle appellant's partnership to the refunds were in order, he assumed the refunds were proper and accepted them, less an error found and corrected (R. 362-6). The trial was years after earlier and preliminary matters had occurred; and it was the claim of defendant, that there was no intent to defraud,

but merely an error. Further the Government never established that the defendant's partnership was not entitled on ground of obsolescence (the machines running 24 hours a day) [See Record 360, 361, 87 to 89, 520] to the refunds.

We submit that under the indictment, no crime was charged; that no crime was proved; that the law has been disregarded in the conviction of the defendant-appellant, Lester E. Butzman, Sr., as appears from the briefs and petition for rehearing in the Court of Appeals, and the brief herein, which is confined to support of the questions submitted and the jurisdiction of the Supreme Court to entertain and grant the Petition for Certiorari, and remove the injustice done in the conviction of Lester E. Butzman, Sr.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the indictment charged a crime;
2. In holding that any crime was proved;
3. In holding that trial to the Court waived the motion for change of venue on the ground that a fair jury could not be obtained by reason of the vicious publicity;
4. In affirming the judgment of the District Court.

MICHAEL LEO LOONEY,
Counsel for Petitioner.

DANIEL H. WASSERMAN,
Of Counsel.

BRIEF OF PETITIONER.

REASONS FOR GRANTING THE WRIT.

I. The Statute under which the indictment was framed, Title 26, § 3793(a)(1), had no relation to any act of the defendant, it applying only where a defendant simulates (that is imitates) or signs or executes a document as if it were some other party's instrument.

The indictment did not allege that Lester E. Butzman, Sr., did anything of the kind. It only alleged that the application signed by him contained what the Government claimed was a misstatement of his firm's right to refunds under the Internal Revenue Laws. Such a misstatement does not make a simulated or falsely executed document.

The Court of Appeals disregarded this point of the appellant, and his authorities supporting his contention.

See:

Wright v. United States, 172 Fed. (2d) 340;
United States v. Moore, 60 Fed. 738, syl. 1, p. 739.

This statute and its construction should be settled by the Supreme Court of the United States.

II. The Government based its whole claim of crime on the recital in the indictment of the words,

> "in which document it is represented that said Lester E. Butzman, Sr., was entitled under the provisions of the Internal Revenue laws to claim a credit for the years 1941, 1942 and 1944 of refunds totalling $56,078.61"

which it claimed was false, because no Necessity Certificates had been granted; though it did not directly so charge.

Our position is that the recital of representation was not of fact, but of opinion, and mere conclusion of law, which could in no event affect the act of any authority.

The Court of Appeals paid no attention to our references sustaining our view, contenting itself with saying: "This is an allegation of fact rather than a conclusion of Guilt."

The Court of Appeals disregarded, among other cases cited by us:

Johnson v. U. S., 294 Fed. 753;
U. S. v. Bressler, 160 Fed. 2d 403;
U. S. v. Goggins, 1 Fed. 49;
United States v. Baltimore and Ohio Railroad Co., 153 Fed. 997;
Alabama Packing Co. v. U. S., 167 Fed. (2d) 179.

Further, the Court of Appeals assumed that a representation that defendant "was entitled under the provisions of the Internal Revenue laws to claim a credit of refunds," was limited to a right under only one of the provisions, to wit, where certificates of necessity are granted, when there were other provisions such as the depreciation and obsolescence provisions entitling him to a refund (see Record, 367 to 376, 520).

This was contrary to law, and the Court of Appeals disregarded

Bartlett v. U. S., 106 Fed. 884, p. 885;
U. S. v. Ashley Bread Co., syls. 8 and 10, 59 Fed. Supp. 671,

and other cases cited in the briefs below.

III. The indictment has the defects recognized as fatal in the settled practice of the Federal Courts, but there are no Federal Decisions, of the nature of *State vs.*

Herman, 162 S. W. 2d 273 and *Commonwealth v. Norton*, 93 Mass. 266, but the principle should be recognized, to the effect

> "that it is not every false pretense which can be made the basis of a criminal prosecution. It must be such a one as is calculated to deceive,"

and it is held that it is the duty of the party to

> "avail himself of the means of detection at hand at the very time to determine the truth or falsity of the accused's representations."

In case at bar the forwarding of the application with the numbers on its face to the place where the Certificates of Necessity were with the accompanying information of the granting or denial thereof must have been made in the belief that the Certificates of Necessity had been granted—this is a common sense rule which safeguards and does not make those whom circumstances involve in an unhappy situation liable as criminals when there was no criminal intent.

IV. The defendant did not waive his motion for a change of venue, because he did not go on with a jury, which had been part of a community, subjected to vicious newspaper attacks on the defendant, so no favorable verdict would be expected, and he should not be deprived of a review, because he did not expose the Government to a needless heavy expense, and the law does not deprive him of his right to a fair jury of another district by so doing.

See 199 Fed. (2d) 1077, *Delaney v. U. S.* The Court there described the "publications as constituting a veritable avalanche of highly prejudicial publicity * * *."

We submit that what is shown in the record of the publication meets with the definition in that case.

The Court in the *Delaney* case granted a new trial, though the peremptory challenges had not been exhausted.

No attention was paid to this case cited as well as others.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL LEO LOONEY,

Counsel for Petitioner.

DANIEL H. WASSERMAN,

Of Counsel.

APPENDIX.

The defendant was charged with violation of Title 26, Section 3793 (a) (1), Internal Revenue Code. This Statute reads as follows:

> "Every person who * * * simulates or falsely or fraudulently executes or signs any bond, permit, entry or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, * * * shall be imprisoned for a term not less than one year nor more than five years. * * *"

The indictment reads as follows:

> "That on or about January 14, 1946, in the Eastern Division of the Northern District of Ohio, *Lester E. Butzman, Sr., late of Cleveland, Ohio, did lawfully and knowingly, falsely and fraudulently, with intent to defraud, execute a document* required by the provisions of the internal revenue laws and regulations, to wit, Application for Tentative Adjustment with Respect to Amortization Deduction, which document was filed with the Collector of Internal Revenue for the 18th Internal Revenue Collection District of Ohio, at Cleveland, *in which document it is represented that the said Lester E. Butzman, Sr., was entitled under the provisions of the Internal Revenue laws to claim a credit for the years 1941, 1942 and 1944 of refunds totalling $56,078.61*; whereas, as the said defendant then and there well knew, the information contained in the Application aforesaid was false and untrue in that the Necessity Certificates which formed the basis of the claim for the refund in said Application had not been granted and the said defendant was not entitled to the refund as claimed;

"In violation of Section 3793 (a) (1), Internal Revenue Code; Section 3793 (a) (1), Title 26, United States Code.

A True Bill

Paul R. Balliett, Foreman

Don C. Miller,

United States Attorney."

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 231

LESTER E. BUTZMAN, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no written opinion. The opinion of the Court of Appeals (R. 629-639) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction was entered June 22, 1953 (R. 628), and an order denying the petition

for rehearing was entered July 16, 1953 (R. 655). The petition for a writ of certiorari was filed August 4, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the indictment states an offense within Section 3793(a) of the Internal Revenue Code.

2. Whether the fact that the Government had available the means to determine the falsity of the allegations of a document submitted to it in support of a claim negatives the intent to execute the document falsely.

3. Whether petitioner was deprived of a fair trial because of the denial of his motion for a change of venue on the grounds of the alleged bias of the potential jurors, where petitioner waived his right to a trial by jury without questioning the potential jurors on voir dire.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

Sec. 3793. PENALTIES AND FORFEITURES.

(a) *Fraudulent Bonds, Permits, and Entries.*

(1) *Penalty.*—Every person who—

(*A*) *Simulation or execution.*—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuant thereof, * * *

shall be imprisoned for a term not less than one year nor more than five years * * *.

(26 U.S.C. (1946 ed.), Sec. 3793.)

STATEMENT

Petitioner was indicted January 10, 1952, on one count charging that on or about January 14, 1946, he wilfully, knowingly, falsely and fraudulently, with intent to defraud, executed a document required by the Internal Revenue laws (R. 2). The indictment identified the document as an Application for Tentative Adjustment with Respect to Amortization Deduction, in which petitioner claimed he was entitled to a tax refund in the amount of $56,078.61.

Petitioner moved for a change of venue, alleging that, by reason of unfavorable local Cleveland newspaper publicity, he could not obtain a fair and impartial trial in the Northern District of Ohio (R. 4-5). A change of venue was denied (R. 23), the trial court stating that, inasmuch as 28 of the 52 jurors composing the venire came from counties other than that in which Cleveland is located, it could not assume that every prospective juror had read the newspaper comments (R. 29-30). The trial court did, however, promise to reconsider this ruling if it appeared, on examination of the jurors, that it was impossible to get an impartial jury (R. 30). After a recess, petitioner, without questioning any prospective jurors, waived a jury and consented to trial by the court (R. 31).

The oral statement by the trial court of its findings is not questioned and may be summarized as

follows: The petitioner, during the years in question, was the controlling partner in the Ohio Tool Company, a partnership (R. 583-584). In 1943 this company made applications under Section 124 of the Internal Revenue Code for certificates of necessity to permit accelerated amortization deductions, over a five-year period, of emergency facilities it had installed (R. 583, 584). The first application was informally made in April, 1943, and a certificate was formally applied for on May 21, 1943, covering facilities stated to cost approximately $853,000. The War Department gave this application its number W D-N-22024. (R. 584.) The second application, covering facilities costing approximately $67,000, was filed in June, 1943, and was numbered W D-N-23426 (R. 584). Each of these applications was denied by the War Department in letters to the Ohio Tool Company dated, respectively, October 9, 1943, and October 8, 1943, which were received by the Ohio Tool Company (R. 584).

Although petitioner denied that he had any knowledge of the rejection of the applications for certificates of necessity (R. 584), three witnesses testified directly that petitioner had such knowledge. One of the witnesses, an employee of the Ohio Tool Company's accounting firm, was present at meetings with petitioner in the fall of 1943 when petitioner discussed the rejection of the applications and directed the accounting firm to reapply. Petitioner later became dissatisfied with the progress made in the preparation of renewed applica-

tions for certificates of necessity and ordered the work discontinued. The head of the accounting firm employed by the Ohio Tool Company testified that the letters of rejection from the War Department were delivered to him by petitioner with direction to revise the applications and to re-submit them to the War Department. (R. 585.) A third witness, a civilian employee in the Cleveland office of the Ordnance Department, stated that in his capacity as Chief of Facilities he personally examined the Ohio Tool Company plant and recommended against allowance of the Ohio Tool Company's application for a certificate of necessity. He further testified that in October or November, 1943, petitioner came to his office and berated him for recommending denial of the certificates of necessity. (R. 587-588.)

Section 124 of the Internal Revenue Code provides for the tentative adjustment of amortization, retroactively over the period from 1940 to 1945, on the termination of the War Emergency Period by Presidential Proclamation. In January, 1946, petitioner executed applications for tentative adjustment for himself and his partners, recomputing their respective taxes for the years 1941, 1942, 1943 and 1944. The refunds amounted to over $100,000. (R. 596.) Petitioner's application referred to certificates of necessity by the War Department, bearing serial numbers W D-N-22024 and W D-N-23426, which actually were non-existent, and to a letter submitted December 20, 1945, by the Ohio Tool Company's comptroller, to the Commissioner

of Internal Revenue, electing to amortize the facilities covered by the non-existent certificates of necessity (R. 596, 632). The application was duly processed by the Bureau of Internal Revenue, which did not discover that the supposed certificates of necessity had been denied. Refund checks were sent to petitioner and his partners in the sum of $109,000. (R. 596, 598, 633.)

On these facts petitioner was found guilty of violating 26 U.S.C. 3793(a)(1) (*supra*, p. 2), and was sentenced to three years' imprisonment (R. 613-614). The Court of Appeals for the Sixth Circuit unanimously affirmed (R. 629-639).

ARGUMENT

None of petitioner's contentions has merit, and the petition for a writ of certiorari presents no question warranting review by this Court.

1. Petitioner's contention (Pet. 7), that the indictment did not state an offense within Section 3793(a)(1), is based upon the argument that that section applies only where a defendant treats a document "as if it were some other party's instrument." Here, petitioner argues, his Application for Tentative Adjustment merely contained a "misstatement". But Section 3793(a)(1) expressly applies to anyone who "* * * falsely or fraudulently executes or signs any * * * document * * *," and the evidence showed that petitioner filed a document by which he was to receive a substantial refund of taxes, knowing that the document contained false statements. It is clear that the fraudulent execution of such a document

comes within the statutory proscription. *United States* v. *Tommasello,* 160 F. 2d 348 (C.A. 2); *Lewis* v. *United States,* 170 F. 2d 43 (C.A. 9); *cf. United States* v. *Monarch Distributing Co.,* 116 F. 2d 11, certiorari denied, 312 U.S. 695.

Petitioner's further contention (Pet. 7-8) that the indictment was invalid because it contained only conclusions of law is completely without substance. The indictment alleged that he had falsely executed a document required by the provisions of the Internal Revenue laws. The remainder of the indictment supplied additional facts which identified the document. Without question, such allegations come with the category of "facts," rather than "conclusions of law." *Todorow* v. *United States,* 173 F. 2d 439, (C.A. 9), certiorari denied, 337 U.S. 925. Further, as the court below pointed out (R. 634), petitioner did not make a motion either to dismiss the indictment in the trial court, or for a bill of particulars, but went to trial on the indictment. In these circumstances, there is no merit to his contention that the indictment was defective. *Hagner* v. *United States,* 285 U.S. 427.

2. Petitioner's assertion, that because there existed material in the Government files which would have proved that his claim was false, he could not have been guilty of the crime charged, is frivolous. The gist of the crime is the knowledge of petitioner that the document contained false statements and that they were calculated to deceive the Government officials charged with the duty of passing on his application for a tentative adjustment. Indeed, petitioner's document had just that effect, as

he received a refund of taxes on the strength of that very document. (R. 635.)

3. Petitioner's complaint relating to venue rises to no higher level than his others. The facts alleged in his motion to change venue were, as found by the courts below (R. 29-30, 636) insufficient to warrant the granting of the motion. But, in any event, petitioner has shown no prejudice, as he made no attempt to show by interrogation on *voir dire* that the jurors were in fact so prejudiced by the allegedly offending newspaper articles that he could not receive a fair jury trial. He deliberately and expressly chose a trial by the court instead, and nowhere does he allege that the trial court did not afford him a fair trial.

CONCLUSION

The judgment of the Court below is clearly correct and presents neither a conflict of decisions nor any question warranting review by this Court. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
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SEPTEMBER, 1953.

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